90-1639

No.

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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UNITED STATES OF AMERICA, PETITIONER

*v.*

ROBERT WIDDOWSON, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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KENNETH W. STARR
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## QUESTIONS PRESENTED

1. Whether Section 201(h) of the Controlled Substances Act, 21 U.S.C. 811(h), unconstitutionally delegates to the Attorney General the authority to list a drug temporarily as a schedule I controlled substance.

2. Whether the Attorney General lawfully delegated his authority under Section 201(h) to the Administrator of the Drug Enforcement Administration.

## PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the United States of America and respondents Robert Widdowson, Bruce Bachman, and Michael Whitely.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Solicitor General petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

### OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-16a) is reported at 916 F.2d 587. The district court's opinion (App., *infra*, 17a-24a) is reported at 723 F. Supp. 583.

### JURISDICTION

The judgment of the court of appeals was entered October 15, 1990. A petition for rehearing was denied February 1, 1991. App., *infra*, 25a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 26a-28a.

## STATEMENT

Section 201(h) of the Controlled Substances Act, 21 U.S.C. 811(h), provides the Attorney General with a streamlined procedure for temporarily listing a drug as a schedule I controlled substance when he finds that the action is "necessary to avoid an imminent hazard to the public safety." On October 15, 1987, the Attorney General's delegate, the Administrator of the Drug Enforcement Administration (DEA), used that authority to list N-hydroxy-3,4-methylenedioxy-amphetamine (NMDA) temporarily as a schedule I controlled substance pending proceedings for permanent listing. See 52 Fed. Reg. 38,225 (1987); see also 52 Fed. Reg. 30,175 (1987) (notice of intent). On April 13, 1989, the Administrator permanently listed NMDA as a schedule I controlled substance following a rulemaking in accordance with Section 201(a) of the Act, 21 U.S.C. 811(a). See 54 Fed. Reg. 14,797 (1989).

In 1988, respondents were indicted on charges related to their alleged manufacture and possession of NMDA. The alleged offenses occurred after the October 15, 1987, effective date of the Administrator's order temporarily listing NMDA as a schedule I controlled substance, but prior to the April 13, 1989, effective date of the permanent listing. App., *infra*, 3a. On March 29, 1989, the United States District Court for the District of New Mexico issued a memorandum opinion dismissing the indictment. *Id.* at 17a-24a. The court concluded that the Administrator

provided adequate public notice of his temporary listing decision through the Federal Register publication of the decision. *Id.* at 18a-21a. The court agreed with respondents' assertion, however, that Congress did not authorize the Attorney General to subdelegate the Section 201(h) authority to the Administrator. Pet. App. 22a-24a. The court did not reach respondents' contention that Section 201(h) unconstitutionally delegates legislative power to the Executive Branch. *Id.* at 18a.

The court of appeals affirmed the dismissal of the indictment. App., *infra*, 1a-16a. The court first concluded that Congress's grant of the Section 201(h) authority to the Attorney General amounted to an unconsitutional delegation of legislative power. *Id.* at 3a-9a. As an alternative holding, the court concluded that the Attorney General lacked statutory authority to subdelegate his Section 201(h) powers to the Administrator of the DEA. Pet. App. 9a-16a. The court of appeals expressly recognized that its resolution of the constitutional and the statutory delegation issues was in conflict with a prior decision of the United States Court of Appeals for the Third Circuit. *Id.* at 9a. See *United States* v. *Touby*, 909 F.2d 759 (3d Cir. 1990), cert. granted, No. 90-6282 (Jan. 14, 1991).

## REASONS FOR GRANTING THE PETITION

The United States submits that the court of appeals erred in holding that Section 201(h) of the Controlled Substances Act amounts to an unconstitutional delegation of legislative power and that the Attorney General lacks statutory authority to subdelegate his Section 201(h) powers to the Administrator of the DEA. The legal question presented in

this case are identical to those presented in *Touby* v. *United States*, No. 90-6282 (argued Apr. 17, 1991). This case and *Touby* involve different drugs, but that distinction has no relevance to the legal questions at issue. Accordingly, the petition for a writ of certiorari in this case should be held pending this Court's resolution of the issues presented in *Touby* and disposed of, as appropriate, in light of that decision.

## CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's resolution of *Touby* v. *United States*, No. 90-6282.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

APRIL 1991

**APPENDIX A**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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Nos. 89-2075, 89-2085 and 89-2086

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

ROBERT WIDDOWSON, also known as ROB SULLIVAN, BRUCE BACHMAN, and MICHAEL WHITELEY, DEFENDANTS-APPELLEES

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Oct. 15, 1990

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Before HOLLOWAY, Chief Judge, and SETH and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

Defendants Robert Widdowson, Bruce Bachman, and Michael Whiteley were indicted on counts involving conspiracy to manufacture, manufacture, possession with intent to distribute, and distribution of the drug N-hydroxy-3, 4-methylenedioxyamphetamine (NMDA), temporarily classified as a Schedule I controlled substance. The Administrator of the Drug Enforcement Administration (DEA) placed NMDA temporarily on Schedule I, acting under a delegation order of the Attorney General. Defendants filed a

motion to dismiss their indictments, contending, alternatively, that the delegation of the Attorney General was unconstitutional, that the Attorney General had not subdelegated this scheduling function to the DEA Administrator, and that if he had, under 21 U.S.C. § 811(h), he lacked power to make such a subdelegation and must himself make this scheduling decision. The district court granted the motion without passing on the constitutional argument, 723 F. Supp. 583, and the United States appealed.

## I

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, Pub.L. No. 91-513, 84 Stat. 1236. Title II of that Act, known as the Basic Controlled Substances Act (the Act), separates controlled substances into five schedules. *See* 21 U.S.C. § 812(b). Penalties for violating the Act depend upon the schedule in which the relevant drug is found.

Section 201(a) of the Act, 21 U.S.C. § 811(a), gives the Attorney General the authority to determine in which schedule drugs should be placed permanently. The Attorney General can place a drug permanently upon a particular schedule only after following a procedure that includes a number of safeguards. *Id.* § 811(a)-(c). In 1984, Congress amended § 811 by adding subsection (h). *See* Pub.L. No. 98-473, tit. II, sec. 508, 98 Stat. 1837, 2071-72 (codified at 21 U.S.C. § 811(h)). Under § 811(h), the Attorney General can circumvent the ordinary procedures and safeguards for scheduling drugs if "necessary to avoid an imminent hazard to the public safety." In such a case, the Attorney General has unfettered discretion to temporarily place a drug in Schedule I.

In 1973, the Attorney General delegated to the Administrator of the DEA the authority under § 811(a) to permanently schedule drugs. *See* 28 C.F.R. § 0.100 (b) (1986). We held in *United States v. Spain*, 825 F.2d 1426 (10th Cir.1987), that this 1973 delegation order did not apply to the 1984 amendment which added § 811(h). In July 1987, the Attorney General made a new delegation order that purported to delegate to the DEA Administrator all "[f]unctions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended" 28 C.F.R. §0.100(b) (1989). The Attorney General commented that the 1987 delegation "ensure[s] that any functions vested in Attorney General by statutory amendments to the [Act] are delegated to the Administrator." 52 Fed.Reg. 24,447 (1987). Although the 1987 delegation does not expressly mention § 811(h), we conclude that it effectively delegates all delegable powers held by the Attorney General under the Act, and we do not discuss that issue further. *See United States v. Touby*, 909 F.2d 759, 767-68 (3d Cir.1990) (1987 delegation effectively delegates Attorney General's temporary scheduling authority).

In August 1987, the DEA Administrator gave notice that NMDA would be placed on Schedule I. *See* 52 Fed.Reg. 30,175 (1987). Two months later, the Administrator temporarily placed NMDA on Schedule I. *See* 52 Fed.Reg. 38,225-26 (1987). In 1988, the defendants were indicted for their involvement with NMDA.

## II

The district court did not address the constitutionality of the delegation under § 811(h) from Congress to the Attorney General because it ruled for defendants on another basis. In *Spain*, we expressed

doubt about the constitutionality of this delegation, but found it unnecessary to decide the issue. *See Spain*, 825 F.2d at 1429. The Third Circuit's recent opinion in *United States v. Touby*, 909 F.2d 759 (3d Cir.1990), contains two well developed, opposing views on the constitutional issue. *See id.* at 766-68, (majority opinion) 774-76 (Hutchinson, J., dissenting). *See also United States v. Emerson*, 846 F.2d 541, 545-46 (9th Cir.1988) (upholding constitutionality of delegation). Because logic would seem to compel consideration of Congress' delegation to the Attorney General before passing upon subdelegation to the DEA Administrator, and because we believe a discussion of the constitutional issue strengthens the statutory argument against subdelegation to the DEA Administrator, we choose here to decide whether the delegation to the Attorney General violates the separation of powers doctrine.

We already have held that the *permanent* scheduling power given to the Attorney General and the Secretary of Health and Human Services by § 811(a) is not an unconstitutional delegation of Congress' legislative power. *United States v. Barron*, 594 F.2d 1345, 1352-53 (10th Cir.), *cert. denied*, 441 U.S. 951, 99 S.Ct. 2180, 60 L.Ed.2d 1056 (1979). In *Barron*, we relied upon the reasoning of other circuit opinions holding to the same effect, especially *United States v. Pastor*, 557 F.2d 930 (2d Cir.1977). *Pastor* is the first and leading circuit court case to consider the constitutionality of Congress' delegation to the Attorney General of the power to make permanent scheduling decisions; it analyzed the issue extensively. In upholding the § 811(a) delegation, it relied on the precise standards governing the Attorney General's scheduling decisions and the specific findings required

before scheduling. It also relied upon the following restraints on any potential abuse of the Attorney General's power to make and enforce the same law: (1) the Attorney General cannot act contrary to the Secretary of Health and Human Services' recommendation; (2) he must follow the public notice and hearing requirements of the Administrative Procedure Act; and (3) his actions are subject to judicial review. *Pastor*, 557 F.2d at 941. Subsequent circuit court cases upholding the constitutionality of the § 811(a) delegation relied on similar reasoning.[1]

The *Pastor* and *Barron* holdings are correct, we believe. But they do not resolve the instant case, which involves Congress' delegation of the power to make *temporary* scheduling decisions under § 811(h).

Separation of powers as doctrine may appear to be moribund, but we do not agree with those who think it is dead. The Supreme Court recently relied on the separation of powers doctrine to strike down the one-House veto in *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), and to hold § 251 of the Gramm-Rudman-Hollings Act unconstitutional in *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). Even more recently, the Court

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[1] In *United States v. Hovey*, 674 F.Supp. 161 (D.Del.1987), the court canvassed circuit court cases addressing the constitutionality of the § 811(a) delegation. *Hovey* noted that in uniformly upholding the delegation these courts generally relied on four factors:

> "(1) the clear statement of congressional policy; (2) the specificity of the standards guiding the decisionmaker; (3) the need for delegation in order to meet the congressionally identified problem; and (4) the availability of judicial review to prevent arbitrary decisions."

*Id.* at 164 (footnotes omitted).

recognized that " 'the integrity and maintenance of the system of government ordained by the Constitution,' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 654, 102 L.Ed.2d 714 (1989) (quoting *Field v. Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).

Although the Supreme Court uniformly has upheld extensive delegations of power permitting administrative agencies to regulate activities and industries, "The area of permissible indefiniteness narrows . . . when the regulation invokes criminal sanctions. . . ." *United States v. Robel*, 389 U.S. 258, 275, 88 S.Ct. 419, 430, 19 L.Ed.2d 508 (1967) (Brennan, J., concurring). When delegating the power to deprive persons of their liberty, Congress must provide procedural protections, adequate standards reflecting a "legislative judgment" and adequate notice to those affected. *Id.* at 275-82, 88 S.Ct. at 429-34. In upholding Congress' recent delegation to the United States Sentencing Commission to promulgate binding sentencing guidelines, the Supreme Court distinguished *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935) (which struck down congressional delegations permitting the President to promulgate regulations invoking criminal penalties), by noting that the sentencing commission delegation "[did] not make crimes of acts never before criminalized." *Mistretta*, 109 S.Ct. at 655 n. 7. *See also Fahey v. Mallonee*, 332 U.S. 245, 249, 250, 67 S.Ct. 1552, 1553, 1554, 91 L.Ed. 2030 (1947).

A major difference between the majority and the dissent in *Touby* was whether the power delegated to the Attorney General by § 811(h) was the power to define primary criminal conduct—to create a crime. We agree with dissenting Judge Hutchinson; the power to criminalize the manufacture and sale of a previously legal drug, and to subject violators to what could be life sentences, [2] is the power to create a crime. But that does not end the inquiry, since the power of permanent scheduling under § 811(a) is equally the power to define primary criminal conduct, and we have found that delegation valid.

We believe that § 811(h) violates the nondelegation doctrine because of the lack of safeguards and limitations on the Attorney General's temporary scheduling power. In upholding the Attorney General's permanent scheduling power under § 811(a), it was important that the Attorney General had to obtain scientific information and a *binding* scheduling recommendation from the Secretary of Health and Human Services, that scheduling procedures included specific public notice and hearing requirements, and that the Attorney General's decision was subject to judicial review. *See Pastor*, 557 F.2d at 941. None of these limitations or safeguards is present in § 811(h). The nation's chief law enforcement officer makes the law he is to enforce. In determining that a drug must be scheduled temporarily because it poses "an imminent hazard to the public safety," the Attorney

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[2] Under § 811(h), the Attorney General must place all temporarily scheduled drugs on Schedule I. *See* 21 U.S.C. § 811(h)(1). An individual manufacturing or selling any amount of a Schedulue I drug can be sentenced to life imprisonment if death or serious bodily injury results from use of the drug. *See* 21 U.S.C. § 841(b)(1)(B).

General is charged to consider the drug's history and current pattern of abuse, the scope and significance of that abuse and potential risks to the public health. *See* 21 U.S.C. § 811(h)(1), (3). But he need not follow any scientific advice, he need not hold any hearings—just give thirty days notice in the Federal Register, *id.* § 811(h)(1)—and his decision, by explicit statutory command, *id.* § 811(h)(6), is not subject to judicial review. In other words, the Attorney General acts with unfettered discretion when making temporary scheduling decisions; he could add a substance as innocuous as aspirin to Schedule I and his decision could not be challenged.

We agree with the dissenting judge in *Touby* that § 811(h) and related case law do not permit a defendant charged with manufacturing or selling a temporarily scheduled drug to challenge § 811(h) on any ground other than those considered in the instant appeal.[3] We do not think that the "temporary" nature of temporary scheduling constitutes a limitation that makes the delegation constitutional. Individuals charged and convicted of manufacturing or selling a temporarily scheduled drug could spend nearly eighteen months in prison awaiting permanent scheduling, and it is by no means clear that their convictions could be vacated if the Attorney General decides not to place the drug on the permanent schedule or the Secretary of Health and Human Services prohibits him from doing so.

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[3] We note that in *United States v. Emerson*, 846 F.2d 541, 544 (9th Cir. 1988), the government took the position that review of the constitutional issue was improper. Obviously, we disagree. The government has not taken that position in the instant case.

Court decisions have given significant latitude to congressional delegations to regulate complex, rapidly changing, important activities or products. Certainly harmful drugs is such an area. But we think the instant delegation goes beyond any that have been upheld. Although the authority of *Schechter* may be in doubt in many respects, it was surely correct in stating that although "[e]xtraordinary conditions may call for extraordinary remedies . . . [e]xtraordinary conditions do not create or enlarge constitutional power." *Schechter*, 295 U.S. at 528, 55 S.Ct. at 842 (footnote omitted). Like Judge Hutchinson, we believe that "[i]f this delegation is constitutional, . . . any individual protection provided by the constitutional prohibition against a general delegation of legislative power is a relic of the past." *Touby*, 909 F.2d at 779 (Hutchinson, J., dissenting). Like him, we are "unwilling to consign it to the museum until the Supreme Court so decides." *Id.*

We hold, therefore, that § 811(h) unlawfully delegates to the Attorney General the legislative powers vested in Congress under Art. I, § 1 of the Constitution.

III

Because our conclusion on the constitutionality of the § 811(h) delegation to the Attorney General creates a conflict in the circuits, and the Supreme Court may disagree with our holding, we also treat whether Congress intended to permit the Attorney General to subdelegate to the Administrator of the Drug Enforcement Administration (DEA) the authority to temporarily schedule substances pursuant to 21 U.S.C. § 811(h). The Third Circuit recently held that such authority was delegable. *See Touby*, 909 F.2d at 767-68. On this issue also we respectfully disagree. Considering the statute's plain lan-

guage, its purpose and the dangers inherent in permitting subdelegation of the temporary scheduling function, we hold that a proper construction of its intent was that if Congress' delegation to the Attorney General was valid, only the Attorney General may make temporary scheduling decisions.

The relevant inquiry in any subdelegation challenge is whether Congress intended to permit the delegatee to subdelegate the authority conferred by Congress. *United States v. Giordano*, 416 U.S. 505, 512-23, 94 S.Ct. 1820, 1825, 40 L.Ed.2d 341 (1974); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 119-23, 67 S.Ct. 1129, 1133-35, 91 L.Ed. 1375 (1947); *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 358-67, 62 S.Ct. 651, 652-57, 86 L.Ed. 895 (1942). Ordinarily, Congress intends that duties delegated to the Attorney General be subdelegable:

> "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

28 U.S.C. § 510.

The Supreme Court has noted, however, that "Despite § 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated." *Giordano*, 416 U.S. at 514, 94 S.Ct. at 1826. In *Giordano* the Supreme Court concluded that Congress did not intend to permit subdelegation of the Attorney General's congressionally conferred power to authorize applications for wiretaps. The Court focused on three factors: the delegating statute's language, its purpose, and its legislative history. *Id.* at 512-22, 94 S.Ct. at 1825-30.

The statute the Court considered in *Giordano* provided that "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize" a wiretap application. 18 U.S.C. § 2516(1) (before 1984 amendment). Although the statute did not expressly proscribe subdelegation, the Court concluded that, fairly read, it intended to prevent subdelegation. *Giordano*, 416 U.S. at 514, 94 S.Ct. at 1826.

Like the statute in *Giordano*, § 811(h) does not expressly proscribe subdelegation. Nevertheless, the language of that section on its face is more restrictive than 18 U.S.C. § 2516(1). It mentions only the Attorney General in conferring temporary scheduling authority. "*If the Attorney General finds* that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, *he may*" temporarily schedule the substance. 21 U.S.C. § 811(h)(1) (emphasis added).

It is true, as the United States argues, that 21 U.S.C. § 871(a) states expressly that the Attorney General may delegate "any" of his functions under the Act. That section, however, was enacted fourteen years before temporary scheduling was permitted by § 811(h). And as we have previously noted, although the 1984 enactment of § 811(h) technically was an amendment to the Act, "it was a different and separate addition to the Act with a new purpose and 'procedure.'" *Spain*, 825 F.2d at 1429. Further, § 871(a) merely restates the general rule, already articulated in 28 U.S.C. § 510, that the Attorney General may delegate congressionally conferred authority. In *Cudahy*, the Court faced a similar situation. Although the Fair Labor Standards

Act provided that the Administrator of the Wage and Hour Division "or his duly authorized representative may exercise any or all of his powers in any place," [4] the Supreme Court held that Congress did not intend to permit subdelegation of the Administrator's authority to sign and issue subpoenas duces tecum. The Court stated: "A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words." 315 U.S. at 361, 62 S.Ct. at 654.[5]

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[4] *See* Fair Labor Standards Act of 1938, Pub.L. No. 75-718, 52 Stat. 1060, 1062, § 4(c) (codified at 29 U.S.C. § 204(c)).

[5] We note that *Fleming v. Mohawk Co.*, 331 U.S. 111, 67 S.Ct. 1129, 91 L.Ed 1375 (1947), distinguished *Cudahy* and held that under the Emergency Price Control Act of 1942, the Price Administrator could delegate to district directors his authority to sign and issue subpoenas. Although the relevant statutory provisions interpreted in *Fleming* were practically identical to those interpreted in *Cudahy*, several factors mandated a different result. Among those factors was: (1) a legislative history indicating that Congress intended to permit subdelegation, and (2) a provision granting the Price Administrator broad rulemaking authority that, "may itself [have been] an adequate source of authority to delegate a particular function. . . ." *Id.* 331 U.S. at 121, 67 S.Ct. at 1134.

We believe that *Fleming* does not control the case at hand. There is almost no legislative history underlying the statute at issue in the instant case. Moreover, § 811(h) was enacted fourteen years after Congress granted the Attorney General broad authority to delegate all of his functions under the Basic Controlled Substances Act. In *Fleming*, the provisions granting the Price Administrator broad rulemaking and delegation authority were enacted simultaneously with the provision granting the Administrator's subpoena power.

We note again, as we did in *Spain*, that there seems some special significance that the delegation of authority under § 811(h) is to the Attorney General *alone*. The recommendation of the Secretary of Health and Human Services on medical and scientific matters, and that a drug not be controlled, are binding upon the Attorney General for *permanent* scheduling purposes. 21 U.S.C. § 811(h). In exercising his temporary scheduling authority under § 811(h) the Attorney General is not bound by recommendations of the Secretary. In view of this, it seems extraordinary to assume that Congress intended to permit the temporary scheduling power to be delegated to a lesser administrator such as the head of the DEA.

We are further persuaded to the view that the temporary scheduling decision was intended to be exercised only by the Attorney General in person because of the substantial differences in procedural and substantive safeguards between temporary and permanent scheduling that we have already discussed in Part II. Under § 811(a), the Attorney General must consider a number of technical, scientific and medical factors in making permanent scheduling decisions. *See* 21 U.S.C. § 811(c)(1)-(3), (7)-(8). He cannot even begin permanent scheduling proceedings until he receives a *binding* recommendation from the Secretary of Health and Human Services regarding these factors. *Id.* § 811(b). All that the Attorney General must consider in temporary scheduling are three of the eight factors listed in § 811(c): essentially, "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." *Id.* § 811(h)(3). Further, permanent scheduling under § 811(a) must be preceded by a hearing and public comment. *Id.* § 811(a). Temporary scheduling under § 811(h) requires no such

safeguards. Finally, permanent scheduling decisions under § 811(a) are subject to judicial review, while temporary scheduling decisions under § 811(h) are not. *Id.* § 811(h)(6).

Congress' express purpose in enacting § 811(h) was to permit temporary scheduling if "necessary to avoid an imminent hazard to the public safety." 21 U.S.C. § 811(h)(1). The brief legislative history underlying § 811(h) confirms that it was enacted to protect the public safety: "[Section 811(h)] is designed to allow the Attorney General to respond quickly to protect the public from drugs of abuse that appear in the illicit traffic too rapidly to be effectively handled under the lengthy routine control procedures." S.Rep. No. 225, 98th Cong., 2d Sess. 261-63, *reprinted in* 1984 U.S.Code Cong. & Admin. News 3182, 3446-47 (Senate Judiciary Committee Report on Comprehensive Crime Control Act of 1984).[6]

The decision to bypass ordinary safeguards against error and instead weigh only actual abuse, diversion

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[6] Pointing to the legislative history underlying a 1986 amendment to the Act, the United States argues that Congress contemplated subdelegation. Referring to the 1984 addition of § 811(h), that legislative history states: "The 98th Congress extended to DEA the power to control such new substances on an emergency basis. DEA has used the authority five times to control 13 new dangerous drugs. . . ." H.R.Rep. No. 848, 99th Cong.2d Sess., pt. 1, at 4 (1986).

We are not persuaded that this statement, made in conjunction with a 1986 amendment, has any bearing on the earlier Congress' intent in enacting § 811(h) in 1984. As the Supreme Court has recognized, " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960)).

and clandestine activities to determine whether temporary scheduling "is necessary to avoid an imminent hazard to the public safety," 21 U.S.C. § 811(h)(1), seems peculiarly a decision for an official of cabinet rank. As we noted in *Spain*, 825 F.2d at 1428, "The conclusion as to the hazard to 'public safety' is a standard especially within the expertise of the Attorney General himself and his immediate staff rather than one for a technical group as the DEA." In holding that the Wage and Hour Administrator of the Department of Labor could not delegate his subpoena powers, the Supreme Court relied in part on the dangers inherent in permitting such subdelegation:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer . . . . [T]he subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency."

*Cudahy*, 315 U.S. at 363-64, 62 S.Ct. at 655.

Without question, the unfettered power to criminalize the manufacture and sale of previously legal substances is potentially more oppressive than the power

to sign and issue subpoenas. As one commentator has noted, permitting the Administrator of the DEA to exercise such power is inherently dangerous:

> "The dangers of this power of temporary scheduling, in the hands of an enforcer rather than a policy-maker, are readily imaginable . . . . It is quite possible that a research chemist could be arrested, tried, and convicted for developing a Schedule I drug that later proved to be safe. In any event, there is danger in allowing a technical administrator to make a public policy decision that will place a substance in Schedule I of the drug schedules."

Note, *The Emergence and Emergency of Designer Drugs: Subdelegation of the Power Temporarily to Schedule in Light of* United States v. Spain, 14 Am.J. Crim.Lak 257, 268 (1988). These dangers are only multiplied by the explicit statutory command that temporary scheduling decisions are not subject to judicial review. *See* 21 U.S.C. § 811(h)(6).

We are satisfied that the statutory language and expressly stated purpose of § 811(h), coupled with the dangers inherent in permitting subdelegation of the temporary scheduling function, support our conclusion that this case is more similar to the situation the Supreme Court found in *Giordano* and *Cudahy*, in which it denied subdelegation, than to other cases in which subdelegation was allowed. The meager legislative history does not convince us otherwise.

As an alternative to our holding that the delegation of temporary scheduling to the Attorney General is unconstitutional, we hold that the Attorney General's powers under the 1984 amendment, adding 21 U.S.C. § 811(h), are not delegable.

AFFIRMED.

**APPENDIX B**

UNITED STATES DISTRICT COURT
D. NEW MEXICO

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Cr. No. 88-459 SC

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

ROBERT WIDDOWSON, BRUCE BACHMAN,
and MICHAEL WHITELY, DEFENDANTS

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March 29, 1989

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MEMORANDUM OPINION

CAMPOS, Chief Judge.

This matter came before the Court for a hearing on the motions of Defendants to dismiss the indictment. The indictment returned by the grand jury charged Defendants with numerous violations of 21 U.S.C. § 841, possession with intent to distribute and distribution of a Schedule I controlled substance, a violation of 21 U.S.C. § 846, conspiracy to violate 21 U.S.C. § 856, establishment of operations to manufacture a controlled substance. The substance of concern to each of these counts was N-hydroxy 3, 4-Methylenedioxyamphetamine.

Defendants sought dismissal of the indictment on three grounds: (1) that this substance was improperly placed on Schedule I by the Drug Enforcement Administration in that the procedures for notice were not complied with; (2) that the Drug Enforcement Administration's placement of this substance on Schedule I is invalid because it was done pursuant to a constitutionally invalid delegation of authority to the Drug Enforcement Administration from the Attorney General of the United States; and, (3) that the delegation of authority from Congress to the Attorney General to place substances on Schedule I found in 21 U.S.C. § 811(h) is unconstitutional because it violates the separation of powers doctrine.

At the hearing on Defendants' motions, the Court received evidence and heard oral argument on the first two points raised by Defendants. The Court ruled that the Drug Enforcement Administration did provide adequate notice of its intent to place this substance on Schedule I. However, Defendants' second point was the fatal blow to this indictment. The Court held that the authority delegated to the Attorney General of the United States found in 21 U.S.C. § 811(h) could not, in turn, be delegated to the Drug Enforcement Administration. In view of this holding the Court did not address Defendants' third point. The Court's reasoning on Defendants' first and second arguments is set forth below.

## I. NOTICE REQUIREMENTS OF 21 U.S.C. § 811(h)

21 U.S.C. § 811(h) sets forth a procedure for the temporary scheduling of drugs to avoid imminent hazards to public safety pending a determination of proper permanent scheduling pursuant to 21 U.S.C.

§ 811(a). The temporary scheduling provisions were enacted in 1984 "in an attempt to bypass on grounds of 'public safety' the delays encountered in the formal hearing route under the Administrative Procedures Act" *United States v. Spain*, 825 F.2d 1426, 1427 (10th Cir.1987). The Attorney General is authorized to issue an order placing a drug on Schedule I after complying with the expedited procedures set forth in § 811(h):

> (h)(1) * * * Such an order may not be issued before the expiration of thirty days from—
>
> (A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, * * *

In the matter now before the Court Defendants argued that the notice of the intention to issue an order placing N-hydroxy 3, 4-Methylenedioxyamphetamine on Schedule I was defective, and therefore the order was ineffective. *See, United States v. Caudle*, 828 F.2d 1111 (5th Cir.1987) (failure to follow the procedures set forth in § 811(h) required dismissal of the indictments). On August 13, 1987, a notice was published in the Federal Register entitled "Schedules of Controlled Substances Temporary Placement of N-ethyl MDA and N-hydroxy MDA into Schedule I of the Controlled Substances Act". 52 Fed.Reg. 30175. Two chemical compounds were placed on Schedule I in the body of the notice, the compound pertinent to this matter was shown as N-hydroxy-alpha-methyl-3, 4, (methylenedioxy)phenethylamine (N-hydroxy MDA). 52 Fed.Reg. 30177. Over thirty days after the issuance of this notice, on October 15, 1987 an order was issued placing the following substance on

Schedule I: "N-hydroxy-3, 4-methylenedioxyamphetamine (also known as N-hydroxy-alpha-methyl-3, 4-(methylenedioxy)phenethylamine, and N-hydroxy MDA)."

Defendants argue that the limited nature of the notice was not sufficient to apprise persons that the compound that was the subject of the proposed order was, in fact, N-hydroxy-3, 4 methylenedioxyamphetamine. It may not appear to those who are not proficient in chemistry that the compound named in the notice and that set forth in the subsequent order are the same substance. The testimony of the government's expert witness, a chemist with the Drug Enforcement Administration, demonstrated to the Court that these were, in fact, two names for the same substance, and that any person who had sufficient understanding of chemistry to manufacture this substance would, in fact, understand that these were two different names for the same substance. Defendants did not offer any evidence in rebuttal.

A person cannot be prosecuted for doing an act which is not prohibited by law; to do so is a due process violation of the most basic sort. *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). It is a fundamental requirement of due process that laws give the person of ordinary intelligence a reasonable opportunity to know what constitutes criminal conduct, in other words, a statute must give persons fair warning that certain conduct is proscribed. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). *Colautti v. Franklin*, 439 U.S. 379, 390-91, 99 S.Ct. 675, 683, 58 L.Ed.2d 596 (1979). Objections under the due process clause that are based upon lack of notice may be overcome, however, in any specific case where

reasonable persons would know that their conduct is at risk; the statute is judged on an as-applied basis. *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), citing to *United States v. Powell*, 423 U.S. 87, 92-93, 96 S.Ct. 316, 320, 46 L.Ed.2d 228 (1975); *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975); *Palmer v. City of Euclid*, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971) (per curiam); *United States v. National Dairy Corp.*, 372 U.S. 29, 32-33, 83 S.Ct. 594, 597-98, 9 L.Ed.2d 561 (1963).

The indictment in this matter charges Defendants not with mere possession of a controlled substance, rather, they are charged with manufacturing and distributing the controlled substance. The unchallenged testimony of the government's expert witness established that the names listed in the notice and the order were different names for the same substance. This testimony also established that a reasonable person with the necessary knowledge to be able to manufacture the substance would be aware from the August 13, 1987 Notice of the Intent to Issue an Order that the subsequent order, when issued, would make the possession, distribution and manufacture of the substance a crime. Under the circumstances of this case, the Court rules that the notice which was published on August 13, 1987 was sufficient and adequate. Therefore, the Order of October 15, 1987 is not valid for failure to comport with the notice requirements of 21 U.S.C. § 811(h)(1)(A).

## II. DELEGATION OF AUTHORITY BY THE ATTORNEY GENERAL TO THE DRUG ENFORCEMENT ADMINISTRATION

In this instance, the Drug Enforcement Administration exercised the authority delegated to the Attorney General under 21 U.S.C. § 811(h). In 1987 the Attorney General amended a previous subdelegation of his authority under 21 U.S.C. § 811(a) to the Administrator of the Drug Enforcement Administration to include the functions Congress delegated to him in 21 U.S.C. § 811(h). 28 C.F.R. § 0.100, as amended July 1, 1987, 52 Fed.Reg. 38225. Defendants' second point in urging dismissal is that the Attorney General cannot subdelegate this authority to the Drug Enforcement Administrations. Defendants rely on the decision of the Tenth Circuit in *United States v. Spain*, 825 F.2d 1426 (10th Cir.1987). If Defendants are correct, then the order issued by the Administrator is of no force or effect, and the indictment against them must be dismissed.

The narrow issue before the Tenth Circuit Court of Appeals in *Spain*, supra, was whether the Drug Enforcement Administration had authority to act under 21 U.S.C. § 811(h) and put a drug on Schedule I under a subdelegation of authority made by the Attorney General in 1973; the subdelegation of the Attorney General's functions under 21 U.S.C. § 811(a). The holding of the Tenth Circuit was that the authority delegated to the Attorney General in 21 U.S.C. § 811(h) was sufficiently different than that delegated to him in (a) of § 811, and was such that it could not be delegated to another entity. Therefore, it could not be assumed that the 1973 subdelegation to the Drug Enforcement Administration was operative in relation to the functions set out in 21 U.S.C. § 811

(h). Although other Courts have not gone so far as to state that the Attorney General's functions under 21 U.S.C. § 811(h) could never be delegated, those that have considered the issue decided in *Spain*, supra, have agreed with the Tenth Circuit. See *United States v. Emerson*, 846 F.2d 541, 547 (9th Cir.1988); *United States v. Hovey*, 674 F.Supp. 161, 169-70 (D. Del.1987).

A thorough reading of the *Spain* opinion convinces this Court that the law in the Tenth Circuit is such that the Attorney General may not subdelegate those functions delegated to him by Congress in 21 U.S.C. § 811(h). This statute is at the blurred limits of the separation of powers doctrine. The Court of Appeals noted that it had to take into consideration the essentially "borderline" standards in the delegation of authority by Congress to the Attorney General in determining the validity of the subdelegation.

> We are concerned with new executive branch proceedings to create the definition of a felony which are summary and internal in nature * * *. All elements of the exercise of this authority must conform strictly to the law and decisions. It must be accomplished by the agency having authority to act. The statute must be narrowly read. 825 F.2d at 1429.

The statute specifically states that the requisite conclusion that temporary scheduling is necessary to avoid an imminent public hazard is to be made by the Attorney General alone. The factors that are to be considered are not technical factors, but relate solely to issues of public safety. These aspects of the temporary scheduling process led the Tenth Circuit to state:

> The conclusion as to the hazard to "public safety" is a standard especially within the expertise of

> the Attorney General himself and his immediate staff rather than one for a technical group as the DEA. * * * [The factors to be considered] indicate that the determination is to be made in the summary proceedings by an official concerned with public safety. 825 F.2d at 1428.

Furthermore, the Court of Appeals concluded by noting that "Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated." 825 F.2d at 1429, quoting *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974). The Court cannot escape the strong wording of the Tenth Circuit in *Spain* to the effect that no matter how many times he may try to do so, the Attorney General cannot subdelegate to the Administrator of the Drug Enforcement Administration the functions that Congress placed in his hands in 21 U.S.C. § 811(h).

In light of the foregoing, the Court finds that the placement of N-hydroxy 3, 4 methylenedioxyamphetamine on Schedule I by the Administrator of the Drug Enforcement Administration is invalid as outside the scope of his authority. Therefore, the indictment in this action which charges Defendants with possession with intent to distribute, distribution, manufacture and conspiracy in relation to a Schedule I controlled substance must be dismissed.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Nos. 90-2075
90-2085
90-2086

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

ROBERT WIDDOWSON, also known as ROB SULLIVAN;
BRUCE BACHMAN; MICHAEL WHITELEY,
DEFENDANTS-APPELLEES

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ORDER

Filed February 1, 1991

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Before HOLLOWAY, Chief Judge, SETH and LOGAN, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

## APPENDIX D

### FOOD AND DRUGS—DRUG ABUSE PREVENTION TEMPORARY SCHEDULING TO AVOID IMMINENT HAZARDS TO PUBLIC SAFETY § 201(h), 21 U.S.C. 811(h)

(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) of this section relating to the Secretary of Health and Human Services, schedule such substance in Schedule I if the substance is not listed in any other schedule in section 812 of this title or if no exemption or approval is in effect for the substance under section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355]. Such an order may not be issued before the expiration of thirty days from—

(A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and

(B) the date the Attorney General has transmitted the notice required by paragraph (4).

(2) The scheduling of a substance under this subsection shall expire at the end of one year from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) of this section with respect to the substance, extend the temporary scheduling for up to six months.

(3) When issuing an order under paragraph (1), the Attorney General shal lbe required to consider, with respect to the finding of an imminent hazard to

the public safety, only those factors set forth in paragraphs (4), (5), and (6) of subsection (c) of this section, including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated upon the conclusion of a subsequent rulemaking proceeding initiated under subsection (a) of this section with respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

## DEPARTMENT OF JUSTICE DRUG ENFORCEMENT ADMINISTRATION: GENERAL FUNCTIONS
## 28 C.F.R. 0.100

The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Administrator of the Drug Enforcement Administration:

(a) Functions vested in the Attorney General by sections 1 and 2 of Reorganization Plan No. 1 of 1968.

(b) Functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended. This will include functions which may be vested in the Attorney General in subsequent amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970, and not otherwise specifically assigned or reserved by him.

(c) Functions vested in the Attorney General by section 1 of Reorganization Plan No. 2 of 1973 and not otherwise specifically assigned.

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